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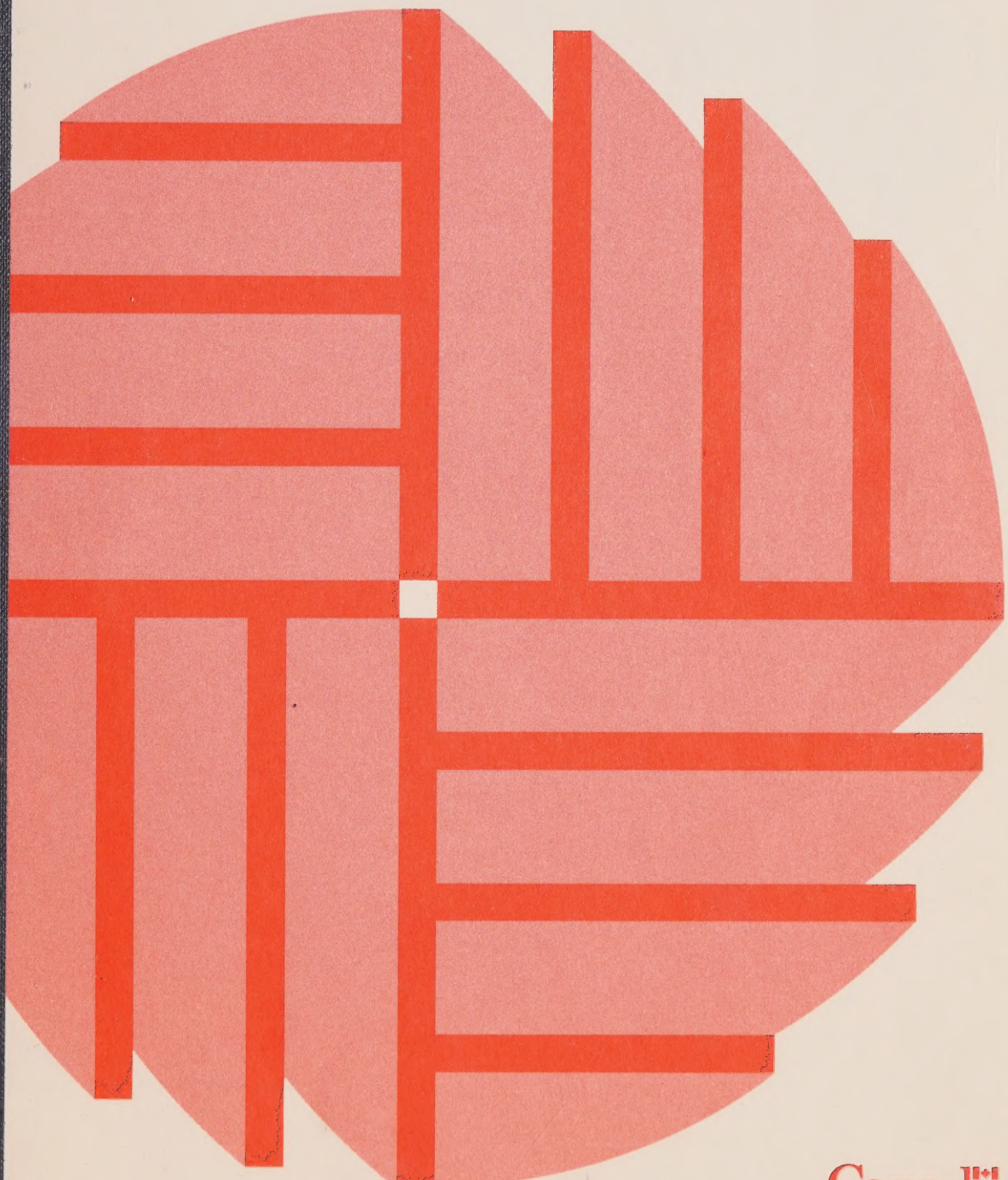

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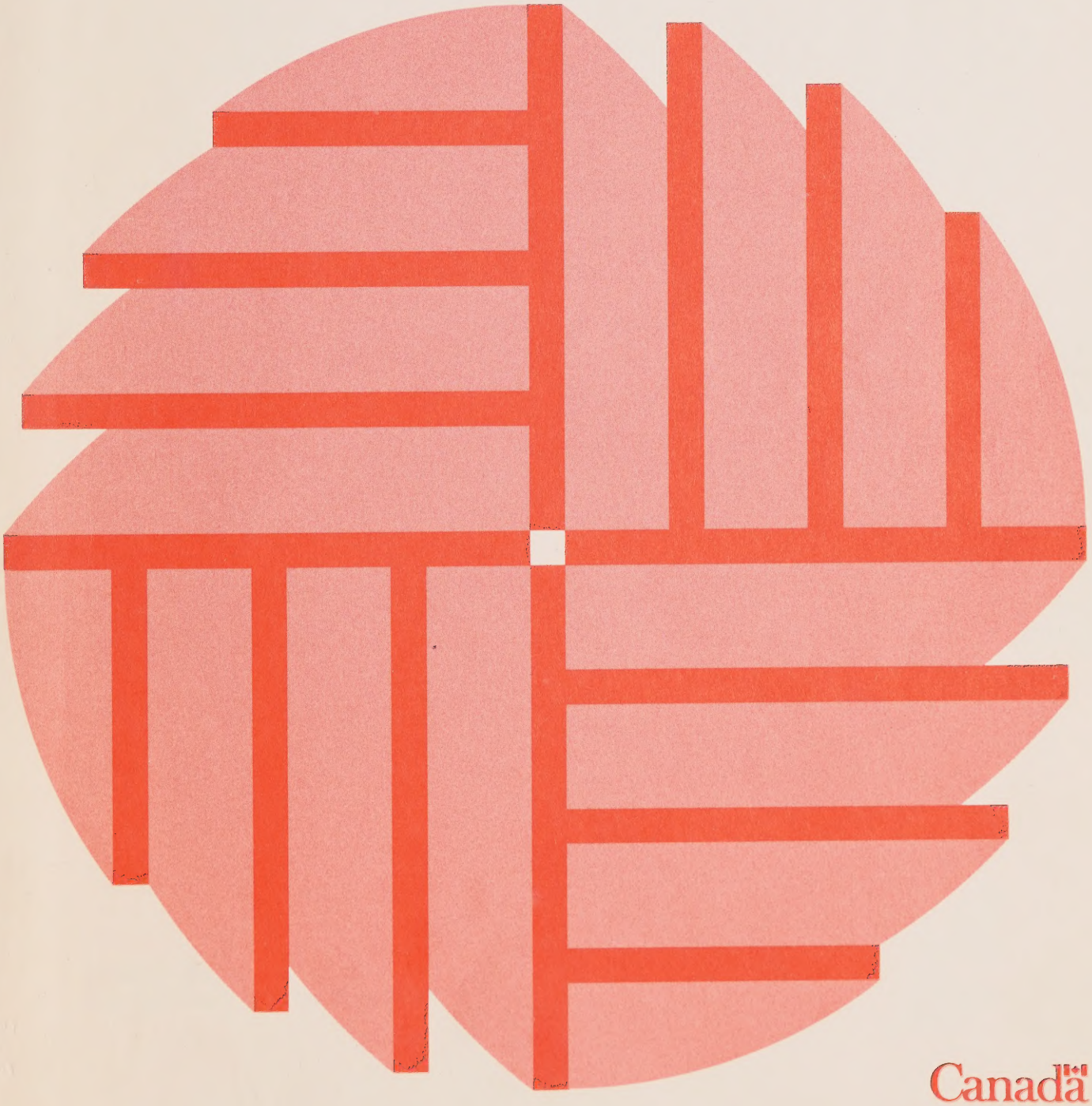

Canada

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SEE SPOT GO TO FAMILY COURT:

A Family Law Primer

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Non-Criminal Courts Programme

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1. INTRODUCTION

This little booklet serves only as a primer to familiarize the reader with the most basic aspects of family law. It should not be taken as legal advice.

Family law is rapidly changing to reflect the new expectations of spouses and of children. The enormous reforms in the 1970's made radical legislative modifications to the common law. This legislation is itself subject to the evolutionary impact of jurisprudence. Judicial interpretation of legislation can be very significant: for instance, the Family Law Reform Act of Ontario is identical to that of Prince Edward Island, but, the judicial interpretation of "family assets" is broader in Prince Edward Island. Therefore, it is important to remember, when considering family law matters, that looking only to the legislation will not reveal the nuances elaborated in the jurisprudence.

Family law is an unusual area of law because of the breadth of discretion put in the hands of judges. Even where the statute defines some of the factors to be considered, judicial decisions reflect wide differences in the weight given to those factors. Judicial attitudes have a significant impact on the outcome of family disputes.

Judicial discretion is also expanded by the inherent parens patriae jurisdiction of the superior courts to take an active role in civil suits to protect the interests of a child.

In Quebec, which belongs to the civil law tradition, not common law, the bulk of the rights and responsibilities of family law are set out in the Civil Code. In civil law theoretically, judicial decisions do not make law but are simply applications of the unchanging provisions of the code. Prior judicial interpretations are not binding on judges applying the same articles of the Code.

However, the differences between the two systems should not be overemphasized:

> "In practice, however, the law, even in a codified system, is able to develop to meet changing social needs, and a civil law judge is aware of the interpretation currently being given by the courts to provision of the Code."[1]

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1. S.M. Waddams, Introduction to the Study of Law (Toronto, the Carswell Co. Ltd., 1979) p.103.

2. CONSTITUTIONAL ASPECTS

A. Division of Powers

Family law is not a discrete subject area assigned exclusively to either federal or provincial control. Instead, it addresses a mélange of problems that arise in the context of the family. Jurisdiction over some of these problems falls into the federal sphere and over others into the provincial sphere.

In section 91(26) of the British North America Act (now the Constitution Act), control over "Marriage and Divorce" is assigned to the federal government. Section 92(12) gives the provinces power over "Solemnization of Marriage in the Province." Further, the provinces control "Property and Civil Rights".

Section 92(13) - which refers to private law relations between individuals, gives the provinces power over adoption, legitimacy, affiliation, guardianship, child welfare, custody and support.

Despite section 92(13), the custody and support provisions in the federal Divorce Act are constitutionally valid as bound up with the direct consequences of divorce. Under the doctrine of federal paramountcy, support and custody orders made under the Divorce Act have precedence over prior orders made under provincial legislation.

Federal control over juvenile delinquency and criminal charges arising out of family disputes is upheld under the criminal law power - section 91(27).

B. Jurisdiction of Courts

Jurisdiction over family matters is fragmented among different court levels. The Canada Act, as it has been interpreted in the courts, imposes restraints on the kinds of courts which can hear certain matters. The jurisprudence holds that section 96 - which empowers the federal government to appoint the judges of the superior, district and county courts - impliedly restricts a province from vesting in an inferior court jurisdiction analogous to that traditionally exercised by a superior, district or county court. For instance, a marriage may not be annulled in a provincial (inferior) court, because, before 1867, it was heard in a superior court.

However, much of what is considered family law has emerged since 1867 and can be administered by inferior courts. Consequently, in most provinces, inferior courts exercise jurisdiction over adoption, child welfare, guardianship, affiliation, and custody and maintenance (outside divorce proceedings).

The jurisdiction of courts to hear certain matters should not be confused with the power of a government to legislate in those areas. Section 96 courts (with federally appointed judges) may hear cases under both federal and provincial legislation. The same may also be true of inferior courts.

Because of this fragmentation of court jurisdiction, some provinces have experimented with Unified Family Courts to hear all family matters in one court. Ontario's UFC in Hamilton is composed of four judges appointed by both the provincial and the federal governments and vested with the authority of a superior court, district court and provincial court judge.

3. PROCEDURES

Most cases in family law are civil actions and are dealt with according to the rules of civil procedure. However, some cases, such as assaults between spouses, are criminal charges which are prosecuted by the Crown according to criminal procedure. The procedure in cases involving juvenile delinquency is specially adapted to protect the privacy of the family and to involve the parents where necessary.

Civil actions are started by an originating document such as a petition for divorce, which is served on ie. personally delivered to the respondent (usually the other spouse) and filed in court. The respondent is given a limited time to file an answer or counter claim. In actions for support or division of property the parties are required to file statements of financial information with their originating document and answer. An application for interim support may be served with the originating document. This motion for interim support is heard expeditiously by a judge or master (judicial officer of the court with limited jurisdiction). The judge may order a pre-trial conference to arrive at a settlement.

Many family disputes may be resolved out of court. However, a divorce must be heard by the court. The judge must satisfy himself that there is no possibility of reconciliation and that there was no collusion between the spouses to present false evidence in order to secure a quick divorce. (A common trick involves the concoction of evidence of adultery when the couple's real problem is incompatability.) The parties may agree on issues related to the divorce - such as custody, support, and property division - and the judge may incorporate their agreement into his order.

In most cases both parties have legal representatives to prepare their case, file the appropriate forms and argue for them in court. In a few instances, the children of the warring spouses may also have independent legal representation. In divorce cases in most provinces, the Official Guardian of the province is notified. The Official Guardian investigates and reports to the court, and may intervene at the trial on behalf of the child(ren).

Using the legal system to resolve family disputes takes time and money. Lawyers are expensive but a necessary part of a divorce. More than time in court is involved. As in any case, much of the work and expense is devoted to pre-trial preparation. However, amicable resolution of many issues in a domestic contract will greatly reduce the amount of expensive lawyer's time.

4. MARRIAGE AND NULLITY

Section 91(26) of the Canada Act gives the federal government control over "Marriage and Divorce" and section 92(12) gives the provinces power over "solemnization of Marriage in the Province". Curiously, the federal government has passed little legislation with respect to marriage, and the provinces have stepped into the vacuum. Provincial Marriage Acts prescribe not only the formalities of marriage but also the requirements of validity of a marriage: the provinces set the minimum age, require parental consent where the hopeful spouses are under-age, and forbid marriage within the prohibited degrees of consanguinity (blood relatives).

Under common law (judge-made law) there are two other important requirements for a valid marriage: the consent of the parties and consummation. Where one of these elements is missing the marriage may be declared void. However, when mere formalities are not complied with the marriage is nonetheless valid if the couple lives together as husband and wife.

In most provinces, a couple wishing to marry must acquire a licence from a provincial authority or publish banns in their parish church. The couple must prove capacity to marry - that they are of age and unmarried or divorced. In some cases, where someone under the age of majority wants to marry and is unable to secure the consent of his/her parents, he/she may apply to the court for an order dispensing with that consent. This will be granted if the consent is unreasonably refused or the parent cannot be located.

A person may also apply to the court for an order of presumption of death of a previous spouse, who has been absent and unheard of for at least seven years.

Nullity

Annulled marriages are marriages that were not valid, and, in a sense, never existed. A marriage may be declared void because it was never consummated as a result of one spouse's impotence. Another ground for annulment is lack of consent: if one or both of the parties was insane at the time of the marriage, did not understand the nature of the ceremony or was under duress, then real consent was lacking and the marriage was not valid.

Historically, the importance of nullity as a legal remedy is conversely related to the availability of divorce. It is a matter of declining importance in today's family law.

5. DIVORCE

Divorce is under federal control, although the government did not pass any divorce legislation of national application until 1968. The Divorce Act confers jurisdiction to grant divorces on a superior court only.

Canada has a mixed fault/no-fault system for divorce. To be granted a divorce a spouse must prove that the other committed one of the following matrimonial offences: adultery, sodomy, bestiality, rape, homosexuality, bigamy, cruelty, gross addiction to alcohol or drugs, inability or refusal to consummate the marriage or desertion. Alternatively, the spouses may mutually agree to separate for at least three years and the court will grant a divorce on the ground of permanent breakdown of the marriage.

There are three bars to divorce: collusion (a conspiracy to deceive the court), condonation (forgiveness of the offence relied on as a ground for divorce), and connivance (conspiracy to make the other spouse commit a marital offence). The court has a duty to ensure that these do not exist. The court also has a duty to ensure that there is no possibility of reconciliation.

When the court grants the divorce, it first grants a decree nisi, which cannot be made absolute until after three months have elapsed and every right of appeal has been exhausted. The spouses may not remarry before the decree is made absolute.

Where a petition for divorce has been presented, the court may grant corollary relief by making a support and/or custody order.

6. MATRIMONIAL PROPERTY

In Quebec, in the civil law tradition, a couple enters a marriage contract upon marriage. they may draw up their own contract or they automatically adopt the contract provided by the law. Under the latter, implied contract, the couple adopts a form of community property. The assets that they acquire after marriage are held jointly and are divided accordingly upon separation, divorce or death.

In the rest of Canada, property is held separately during the marriage, but, upon separation or divorce, the "family assets" are treated as community property and divided between the two. It is the breadth of the definition of "family assets" that is the key determinant of the amount of property to which the spouse, without legal title, (usually the wife) is entitled. However, the breadth of this definition varies from province to province.

In Ontario, a couple's "family assets" include the family's residence and

> "property owned by one spouse or both spouses and ordinarily used or enjoyed by both spouses or one or more of their children while the spouses are residing together for shelter or transportation or for household, educational, recreational, social or aesthetic purposes..."[2]

The court is given the discretion to divide the family assets in portions other than half and to divide the non-family assets between the spouse in certain circumstances to ensure a fair distribution of the property. The extent of the judge's discretion and the circumstances in which he may exercise it vary from province to province.

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2. Family Law Reform Act, R.S.O. 1980, c.152, s.3(b).

7. SEPARATION AND DOMESTIC CONTRACTS

At common law, one of the responsibilities of marriage is the duty to cohabit. Therefore, in many provinces, a judicial order of separation is required to relieve the spouses of the obligation to live together. A separation order may be accompanied by an order for support payments for one spouse and/or the children of the marriage. The judge may also make a custody order with access provisions.

In Ontario, a separation order is not required for the spouses to be legally separated: de facto separation is enough. Nevertheless, many separated spouses apply to the court for support and/or custody orders.

The authority for these support and/or custody orders made in connection with separation is provincial legislation. The factors considered in awarding support and custody may be different in the provincial legislation than in the federal Divorce Act. For instance, emphasis is placed on provincial legislation on each spouse achieving economic self-sufficiency. In the Divorce Act, there is no mention of eventual self-support. However, judicial decisions under the Divorce Act have recently embraced the spousal self-sufficiency doctrine. Further, although it is not specifically stated in the Divorce Act, custody in divorce proceedings is being awarded on the basis of the "best interests of the child" principle set out in provincial legislation.

Domestic Contracts

Domestic contracts include marriage, cohabitation and separation agreements. These agreements are usually considered in court when couples separate. The subjects dealt with in domestic contracts often include maintenance, division and ownership of property, and custody of children.

Where these subjects are dealt with in a domestic contract, the contract usually prevails over the rights given in provincial family legislation. A domestic contract is usually enforceable and binding on the parties, so long as it was made according to the proper form set out in the law: e.g. in writing and witnessed. However, the court may set aside some provisions of a contract in order to protect the best interests of the child(ren) of the couple. Further, in some provinces, such as British Columbia, the court has the power to overturn some clauses in the contract which are held to be unfair. If both parties have received independent legal advice, the contract is more likely to be upheld.

A domestic contract is probably subject to the principles of contract law. For instance, a contract signed under duress without true consent can be voided. A most important principle of contract law is that contracts are private laws between the parties and are enforceable wherever possible.

8. COMMON-LAW RELATIONSHIPS

Many provinces now recognize long-standing common-law relationships as quasi-marriages with similar consequences upon separation, such as orders for support and custody. Where the relationship was of some permanence, the court will determine the issues of support and custody as if the parties were married. What is considered a relationship of some permanence varies from province to province. (For details see the definitions of "spouse" and "child" for each province.)

The issue of division of property is treated differently. Although couples in long-standing common-law relationships may accumulate as much property together as many married couples, provincial legislation does not treat common-law couples as married couples for the purpose of dividing matrimonial property. Therefore, the individual with title keeps ownership.

However, in certain very limited circumstances, a common-law "spouse" may be entitled to a portion of the assets of the other by proving a "constructive trust": loosely speaking, that the relationship was a form of partnership and it was intended by the parties that they should both prosper as a result. For instance, the common-law "wife" of a relationship of some 20 years may be entitled to half the farming business that both built up, even though legal title to the farm is in the man's name.

9. LEGITIMACY AND PATERNITY

Historically, the status of legitimacy has been important for rights of support and inheritance. Ontario, Nova Scotia and New Brunswick have abolished the status of illegitimacy, placing all children on equal footing. All children are equally entitled to support from their parents and to rights of succession to the estates of their parents. Of the other jurisdictions, many give the same rights as enjoyed by legitimate children to those legitimated by their parents' subsequent marriage.

The issue of legitimacy is often linked with questions of paternity. All the jurisdictions have laws respecting identification of the father and the rights of the mother and child to support payments. The mother or a representative of the child may start an action against the putative father(s). There may be a limitation period that bars actions after a certain time. The court may order blood tests as evidence of paternity. These tests can prove conclusively that someone is not the father, but can only indicate a probability that he is the father.

Another legal tool is the use of presumptions written into the law: for instance, until proven otherwise, the mother's husband is presumed to be the father. On the basis of the tests, presumptions and other evidence produced in court, the court may pronounce a man to be the child's father (in the eyes of the law) and responsible for the support of the child. This is sometimes called a filiation order. The court may make filiation orders against two men, and a child may have two legal fathers when the evidence points equally to both men!

10. GUARDIANSHIP

The concept of guardianship is different from custody, although it may include custody. A guardian is defined as

> "a person having the right and duty of protecting the person, property or rights of one who is without full legal capacity or otherwise incapable of managing his own affairs."[3]

The parents of a child are legally joint guardians in most provinces, unless the court orders otherwise. At common law, only the father was the child's guardian. The court will appoint a guardian for a child under the age of majority where the parents are dead or missing or incapable of protecting the child. The question of guardianship often arises in the context of legal responsibility for the financial affairs of the child.

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3 John Burke, Osborne's Concise Law Dictionary, 6th ed. (London: Sweet & Maxwell, 1976) p. 160

11. ADOPTION

In most cases, couples seeking to adopt a child are required to apply to the Director of a provincially-established agency. In some provinces, private adoptions of blood relatives are allowed without the intervention of the agency. All legal adoptions, private or otherwise, must be approved by a judge.

Adoptions may take place as the result of child welfare actions where a child is permanently removed from his/her natural parents.

Generally speaking, after adoption the natural parents lose all their parental rights, including access, and the adoptive parents are the child's legal parents for all purposes. Because of the finality and consequences of an adoption order, provincial laws and court procedures are designed to protect the rights of the parents so far as is just and practical. After all rights of appeal are exhausted, however, the natural parents' rights are extinguished.

In most jurisdictions, the court is charged with the duty of ensuring that the adoption order is in the best interests of the child.

12. CHILD WELFARE

Although Child Welfare Acts in some provinces include such matters as adoption and juvenile delinquency, child welfare is generally understood to refer to the protection of children from neglect or abuse in the home. This mistreatment usually includes both physical and mental factors. The key to understanding the court's right to intervene lies in the statutory definition of a "child in need of protection" and the interpretation of that phrase. See for example section 19(1)(6) of the Child Welfare Act R.S.O. 1980, c.66.

The scale of intervention allowed by the legislation ranges from minimal (eg. supervision and extension of services to the family to improve the family environment) through temporary removal of the child from the family; to the ultimate intervention - permanent Crown responsibility. In the latter situation, the child is permanently removed from the family, made a ward of the Crown (wherein the natural parents lose all parental rights after all appeal possibilities are exhausted) and may be placed in another home for adoption. As the seriousness of the court's intervention increases, the danger of the child's home life must be proven. It is an underlying premise in child welfare law, that the court must do its utmost to protect the integrity of the family, and so a Crown wardship is ordered only where there are no other safe and viable options.

The two major social interests in child welfare matters are: 1) the preservation of the family unit and 2) the protection of the individual child. However, these two goals may occasionally be opposed to one another, creating a tension in the law between the rights of parents to raise their children and the rights of children to grow up in a minimally acceptable environment. This tension is reflected in the procedures involved: rights of appeal to a higher court, periodic review of court orders, and strict time limits on how long a child can be kept away from home by a protective agency without a court hearing. Child welfare cases are usually heard in provincial court because of the importance of acting quickly, providing easy access to the court for the family and maintaining a locally-based solution to the problem.

13. FAMILY CRIMINAL OFFENCES

Although these are criminal matters in every sense of the word, certain criminal offences relating to family life may be heard in family court. The seriousness of the offences is not diminished by their family nature and the full protections of the criminal justice system are maintained.

The relevant sections of the Criminal Code include:

1) s. 168: corruption of children;

2) s.197: non-support of family;

3) s.245: assault (intra-family only); and

4) s.250: abduction (this arises in the context of exclusive custody orders).

The new sexual offences bill currently before Parliament would remove spousal immunity from a charge of rape. Because of the seriousness of the offence, however, spousal rape cases would not be held in family court.

14. YOUNG OFFENDERS

Children accused of offences under federal or provincial legislation are brought to trial under the Juvenile Delinquents Act. The maximum age of delinquency in Canada varies between the provinces, from a low of under 16 in most provinces and under 17 in B.C. and Newfoundland to under 18 in Manitoba and Quebec. The J.D.A. will eventually be replaced by the new Young Offenders legislation which will establish 18 as the uniform, maximum age of delinquency across Canada.

Juvenile trials are quite unlike those of adults: they are private, with no publicity permitted[4]; the proceedings may be informal; there are special detention centres since children may not be held with adult prisoners pending trial; and the judge is given considerable discretion in his handling of the case. He must decide how to dispose of the case in the "best interests of the child". He may order a fine, suspended sentence, supervision by a welfare officer, placement in a foster home, a length of time in training school or compensation to the victim.

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4 However, in a recent Ontario case, the judge decided that the media has the right to witness and report juvenile cases (without mentioning names) according to Canada's new Charter of Rights and Freedoms. The case is now being appealed by the Ontario attorney-general's department.

15. CONFLICT OF LAWS

Many cases in family law will involve more than one jurisdiction. For instance, separated spouses may live in different countries or provinces; a divorcing couple may own property in another province; or a person who subsequently remarries, may have been divorced in another country with very different divorce laws. We then have a conflict of laws which gives rise to questions: which court should hear the case? Which law should be applied? Should the order of a foreign court be recognized and enforced?

The importance of these questions is particularly important in Canada because of 1) its federal nature and 2) its high level of immigration.

There is a complex, inexplicable, unclear, and to my mind, unsatisfactory body of judge-made law to cope with conflicts. This law is based on notion of domicile (residence with a permanent frame of mind).

In family law, there are increasingly statutory solutions to common conflict problems, - for example, Reciprocal Enforcement of Maintenance Orders legislation in all provinces and territories, and the Hague Convention on International Child Abduction (enforcement of custody orders) are being considered in most provinces.

Since the Divorce Act is federal legislation, any Canadian divorce is recognized throughout Canada (and that is it for easy answers).